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In The

Supreme Court of the United States

October Term, 1968

No. 907

PIONEER MOTOR SERVICE, INC.,

Petitioner,

vs.

PIONEER TRANSFER & WAREHOUSE CO., a corporation, JAMES A. GIBBONS and RICHARD WILLIAM MEER,

Respondents.

Answer To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit On Behalf Of Respondents Pioneer Transfer & Warehouse Co. and Herriott Trucking Company

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To: *The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States*:

Pioneer Transfer & Warehouse Co. and Herriott Trucking Company, Inc., two of the petitioning creditors in the petition filed to adjudicate the Pioneer Motor Service, Inc. as an involuntary bankrupt, resist the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals, Seventh Circuit.

STATEMENT OF CASE.

We wish to correct some of the statements of the facts made by petitioner in its brief.

Petitioner states that the vacation pay due the employees of Motor was not due to them at the time of the filing of the petition. The Court of Appeals found otherwise. We refer this Court to Page 2A of Appendix I, Petitioner's Brief. Furthermore, we wish to point out to this Honorable Court that the statement of the case leaves out the essential ground for adjudication of bankruptcy. In the opinion of the Court of Appeals, page 3A of Appendix I, it is stated, "It is undisputed that the Internal Revenue Service having filed its lien on July 25, 1964 did levy on Motor's bank account on July 30, 1964 and collected approximately $800.00 on August 4, 1964 as a result of such seizure of Motor's property. It is further undisputed that Motor did not vacate or discharge such lien five days prior to the disposition of the bank account."

We would also like to point out that the statement of facts fails to mention that Motor was insolvent at the time that this lien was filed on July 25, 1964. Again we refer this Honorable Court to page 3A, Appendix I of Petitioner's Brief.

ARGUMENT.

(a)

THERE IS NO NEED HERE FOR A WRIT OF CERTIORARI.

Rule 19 of the Supreme Court Rules provides that a Writ of Certiorari will be granted only where there are special and important reasons therefore. Such grounds for the issuance of a Writ of Certiorari are not present in the within matter. The opinion rendered by the United States Court of Appeals, Seventh Circuit, clearly indicates that the instant matter was decided in accordance with the provisions of the Bankruptcy Act and the case law interpreting that act. (Appendix I of Petition for Writ of Certiorari, Pages 1A through 4A)

No new point of law was raised or decided in the instant matter, no conflicting bankruptcy rule was rendered, and no departure was made from the established law of bankruptcy. (See Rule 19 of the Rules of the Supreme Court Subsection b). Petitioner attempts to persuade the Court to take jurisdiction because one of the petitioning creditors in the involuntary bankruptcy petition was controlled by a brother of the principal stockholder of petitioner, Pioneer Motor Service, Inc., plus the additional fact that this particular brother was also an employee of the bankrupt at the time that the petition for adjudication was filed. The existence of these facts stirs the petitioner herein to label this as a fraudulent act and to the further assertion that the Bankruptcy Act is being used here as an instrument of fraud. There is no merit to this contention. Section 59 of the Bankruptcy Act provides:

"Who may file and dismiss petitions?*

b. Three or more creditors who have provable claims not contingent as to liability against a person amounting in the aggregate to $500.00 in excess of the value of any securities held by them,* may file a petition to have him adjudged a bankrupt;.*"

There can certainly be no dispute that the word creditor can embrace a brother, a corporation controlled by a brother, or an employee. At this point we would also like to point out that there were four (4) petitioning creditors, three who started the action originally and one who intervened at a later date, to wit: Herriott Trucking Company, Inc. We, therefore, have a sufficient number of creditors outside the corporation controlled by the brother that petitioner complains about. The conduct of the brother or the company he controlled is immaterial so long as the requirements of the Bankruptcy Act are met by the other creditors. The argument of fraud does not and cannot apply to them.

Finally, the fact that one of the petitioning creditors is controlled by a brother and an employee does not raise any evidence of fraud. There must be evidence of fraud presented in the record outside of these facts.

To summarize, a creditor just because he is related to the alleged bankrupt or is an employee is not guilty of fraud because he seeks to collect a debt due him through the orderly liquidation process of the Bankruptcy Court.

Stripped of all of its verbiage, petitioner seeks to invoke the jurisdiction of this Court to review the decision of the Court of Appeals solely on the theory that the Court of Appeals condoned an act of fraud and not

because that decision is contrary to basic bankruptcy rules as interpreted by the courts. Unfortunately for petitioner there is no evidence of fraud and, therefore, there cannot be any condonation of fraud.

(b)

THE OPINION OF THE COURT OF APPEALS DOES NOT PRESENT ANY QUESTIONS FOR REVIEW.

An examination of the first question presented for review by the petitioner in its brief reveals that petitioner is here, no doubt, referring to the so called sixth act of Bankruptcy which is a written admission by the debtor of his inability to pay his debts and his willingness to be adjudicated a bankrupt. (11 U.S.C.A. 21(A)6)

The decision of the Court of Appeals is based entirely on the third act of Bankruptcy. We refer this Honorable Court to the opinion of the Court of Appeals found in petitioner's brief, Appendix I, Pages 3A and 4A where the Court states:

> "We need not consider the several claimed acts of bankruptcy asserted by petitioning creditors which were disallowed by the referee. We shall examine the one act of bankruptcy found valid by the referee."

Section 3 of the Bankruptcy Act, 11 U.S.C.A. 21(a)(3) provides:

> Par. 21. Acts of bankruptcy (a) Acts of Bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; * * *." (Emphasis added.)

It is undisputed that the Internal Revenue Service, having filed its lien on July 25, 1964, did levy on Motor's bank account on July 30, 1964 and collected approximately $800 on August 4, 1964 as a result of such seizure of Motor's property. It is further undisputed that Motor did not vacate or discharge such lien five days prior to the disposition of the bank account.

It is clear from the Bankruptcy Act quoted above that a lien obtained through distraint is an act of bankruptcy. It has been held that a seizure of property to enforce a lien, under the Internal Revenue Code, is a distraint within the meaning of the Act. Collier, Bankruptcy, 14th Ed., Vol. 1, Par. 3.308(6), pp. 470-471; *In Re: Timberline Lodge,* D.C. Ore., 139 F. Supp. 13, 15-17 (1955).

As *Timberline,* supra at 17, aptly quotes from Collier, supra at 471:

> "It is not the lien itself, nor the execution thereunder, which constitutes the act of bankruptcy. It is rather the failure on the part of the debtor to have the same vacated or discharged (1) at least five days before the date set for (the) sale or other disposition of the property, or (2) within thirty days after the creation of the lien.
>
> We conclude, therefore, that the referee did not err in so finding this to be an act of bankruptcy within the purview of the Act."

In our additional statement of facts, we point out that on July 25, 1964 the United States of America Internal Revenue Service recorded a tax lien in the Recorder's Office of Rock Island County, Illinois for a highway use tax in the amount of $3,251.45. On July 30 the Internal Revenue Service levied upon the bank account of Pioneer Motor Service, Inc. On August 4, 1964 as a result of said

levy, the Internal Revenue Service collected $797.45 from the account of Pioneer Motor Service, Inc.

We further point out to this Court that there is no evidence from petitioner that the brother that the petitioner is complaining about had anything to do with the distraint by the Internal Revenue Service of the account of petitioner. This lien was obtained by the Internal Revenue Service in accordance with its rules and regulations and there is no evidence or claim made by the petitioner that this brother urged, consented or participated in the activities of the Internal Revenue Service in carrying out the duty entrusted to it by the law.

There is more than sufficient evidence in the record which, incidentally, petitioner does not deny, that indicates that at this time the petitioner was insolvent.

In point two in its questions presented for review, petitioner argues that there are no bonafide creditors listed in the three petitioning creditors. The Court of Appeals, however, found that there were three petitioning creditors and an intervening fourth creditor. Petitioner's difficulty is that he refuses to accept the findings of fact made by the Court and, therefore, he still takes the position that there were no bonafide creditors.

This Court should not review a finding of fact made by the Court of Appeals where there is no indication that the finding was contrary to the great weight of the evidence.

The third question presented for review should also be disregarded by this Court as nowhere in the Bankruptcy Act is there any provision that provides that an offer to pay is grounds for dismissal of a bankruptcy

petition. Possibly an actual payment of all the debts would eliminate the necessity of further administration of a bankruptcy estate, but as long as there are unpaid creditors, there is a need for the Court sitting as a bankruptcy court to provide an orderly, fair liquidation and distribution of the assets of the estate and pay the claims in accordance with the bankruptcy law. Furthermore, there has never been even an offer to pay, though petitioner states such an offer has been made. For proof of this statement we call to this honorable Court's attention the statement made by Petitioner in question two of the questions presented for review. (See Petitioner brief, page 4). Petitioner states there that none of the three petitioning creditors were bonafide. His offer to pay only bonafide creditors must leave the claims of the petitioning creditors unpaid. In all the years that this matter has been pending, petitioner has not paid one claim.

As far as the fourth question presented for review by the petitioner, we have already pointed out that the relationship of the parties involved does not in itself raise an inference or presumption that fraud is present in the instant matter. Furthermore, we have already pointed out that there is no evidence cited from the record that would in any way indicate the existence of fraud. Lastly the motive of a petitioning creditor is immaterial and will not defeat an adjudication. (*In re National Motorship,* 7 Fed. Supp. 1001, Dist. Ct. S.D. New York 1934 and, *In re Automatic Typewriter,* 271 Fed. 1 (4) Cir. Ct. App. 2nd Cir., 1921.)

CONCLUSION.

There is no basis upon which to issue the Writ of Certiorari. There is no novel question before this Court. This case was decided on the so called third act of Bankruptcy which has been before this Court on a number of occasions. Finally, there is no inference or presumption of fraud or evidence of fraud present in the within matter.

For these reasons it is, therefore, earnestly urged that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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